SUPREME COURT, U.S.

FILED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-[illegible]

Case No. [illegible]

PHYLLIS MORETTI, ROSEMELL SUSI, MAE DIANA,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY, OHIO

BRIEF FOR RESPONDENT IN OPPOSITION

James J. Hughes, Jr.
City Attorney
Daniel W. Johnson
City Prosecutor
Larry Ganjamie
Assistant City Prosecutor
120 W[illegible] Street - #105
Columbus, Ohio 43215
Attorneys for Respondent

MIDWEST LAW PRINTING AND PUBLISHING, INC., Columbus, Ohio 43215

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTION PRESENTED	1
STATEMENT OF THE CASE	2
ARGUMENTS CONTRA ALLOWANCE OF WRIT	
I. A Court of Appeals has not Rendered a Decision in Serious Conflict with the Decision of Another Court of Appeals in the Same Matter	3
II. The Decision Below is Clearly Correct; It Does Not Present Significant and Recurring Problems; and There is No Important Question of Federal Law	4
CONCLUSION	5
CERTIFICATE OF SERVICE	6

CITATIONS

CASES:

State v. Cortman (1968), 446 P. 2d 681 @ 683 5

State v. Johnson, 112 Ohio App. 124 4

State v. Southall, unreported, Franklin County Court of Appeals, No's. 71-229 & 71-230 4

U.S. v. Hooper, 320 F. Supp. 507 (E. D. Term 1969), *affirmed,* 438 F. 2d 969 (6th Cir.) *cert. denied,* 400 U.S. 929 (1970) 4

STATUTES:

Ohio Revised Code, §2933.241 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Case No. 74-75

PHYLLIS MORETTI, ROSENELL SUSI, MAE DIANA,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY, OHIO

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion below is included within the appendix of Petitioner's brief.

JURISDICTION

The jurisdictional requisites are set forth in Petitioner's petition.

QUESTION PRESENTED

Whether an exclusionary rule should be imposed upon an otherwise valid search and seizure where the verified inventory filing requirements of Ohio Revised Code §2933.241 have not been complied with by the police.

STATEMENT OF THE CASE

A motion to suppress evidence came on for hearing before Judge Sidney Golden of the Municipal Court of Franklin County, Ohio, on November 8, 1973. The defendants were charged with promoting a lottery or scheme of chance under Revised Code §2915.12. Part of the state's case was based upon certain physical evidence secured by virtue of search warrants executed at the time of arrest.

At the hearing it was developed that the search warrants were returned to the custody of the Clerk's Office of the Franklin County Municipal Court unaccompanied by any verified inventory.

In applying Revised Code §2933.241, the court ruled that the filing of a verified inventory with the return of warrant is a mandatory requirement of the statute and failure to file such verified inventory rendered the searches invalid and the evidence thereby secured inadmissible in court.

The motions to suppress were sustained and the hearing concluded.

The state filed timely notices of appeal together with the certificate of the prosecutor, required by Criminal Rule 12(J), that the granting of the motion had rendered the state's proof so weak that any reasonable possibility of effective prosecution had been destroyed.

On April 9, 1974, the Court of Appeals of Franklin County, Ohio, reversed and remanded the cases for trial.

The Petitioners filed Notice of Appeal to the Ohio Supreme Court. Petitioners moved for an order directing the Court of Appeals of Franklin County to certify its record and appealed as of right from the Court of Appeals. On September 12, 1974, The Ohio Supreme Court overruled the motion to certify and *sua sponte* dismissed the appeal for the reason that "no substantial constitutional question exists herein."

ARGUMENTS CONTRA ALLOWANCE OF WRIT

I. A Court of Appeals has not Rendered a Decision in Serious Conflict with the Decision of Another Court of Appeals on the Same Matter.

Ohio Revised Code §2933.241 is nearly identical to 18 U.S.C., Rule 41(d). They are set forth as follows:

O.R.C. §2933.241 Inventory of property taken.

> The officer taking property under a warrant for search shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken and shall be verified by the officer. The judge or magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the the applicant for the warrant.

18 U.S.C.A., Rule 41(d), page 212:

> (d) Execution and Return with Inventory. The warrant may be executed and returned only within 10 days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the

> applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken; and shall be verified by the officer. The judge or commissioner shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

A significant case interpreting the Federal Rule is *U.S. v. Hooper,* 320 F. Supp. 507 (E.D. Term 1969), *affirmed,* 438 F. 2d 969 (6th Cir.), *cert. denied,* 400 U.S. 929 (1970). The *Hooper case, supra,* involved a failure by the government to give a receipt for property taken, failure to promptly file the return of warrant and, naturally, the failure to promptly file the inventory. The court ruled that such failures did not invalidate the search where a reasonable search had already been conducted and concluded before the occasion arose for the raiding officers to follow the prescribed procedures.

The Franklin County Court of Appeals in its decision pointed out its unreported case of *State v. Southall,* No's. 71-229 and 71-230 (see p. 12 of Petitioner's brief) which refused to adopt the exclusionary rule. It singled out *State v. Johnson,* 112 Ohio App. 124 from the Court of Appeals for Cuyahoga County (referred to on p. 13 of Petitioner's brief) to show the refusal of that court to exclude evidence where the inventory was not filed. The Franklin County Court of Appeals then cites and refers to numerous holdings, both state and federal, which refuse to so adopt the exclusionary rule. Only a small minority of the cases hold to the contrary.

II. The Decision Below is Clearly Correct; It Does Not Present Significant and Recurring Problems; and There is No Important Question of Federal Law.

It should be pointed out that Revised Code §2933.241

contains no exclusionary provision, nor does it purport to affect the competency of the evidence seized.

State v. Cortman (1968), 446 P. 2d 681 at page 683, points out that there has already been a lawful invasion of rights normally protected by the Fourth and Fourteenth Amendments and a defendant's rights are not prejudiced by an error or omission in failing to file an inventory. In such a case there is no unlawfully obtained evidence.

Clearly, the requirement of an inventory is a satutory and not a constitutional requirement.

CONCLUSION

By reason of the foregoing, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

CITY OF COLUMBUS, OHIO
DEPARTMENT OF LAW

BY _____
JAMES J. HUGHES, JR.
City Attorney

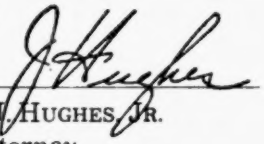
DANIEL W. JOHNSON
City Prosecutor

LARRY GARLINGER
Assistant City Prosecutor

120 West Gay Street - #105
Columbus, Ohio 43215
Attorneys for Respondent

CERTIFICATE OF SERVICE

We hereby certify that on this 8th day of January, 1975, three copies of the foregoing Petition for Writ of Certiorari were mailed, postage pre-paid, to Thomas M. Tyack, Attorney for Petitioner, 536 South High Street, Columbus, Ohio, 43215. We further certify that all parties required to be served have been served.

BY: 

JAMES J. HUGHES, JR.
City Attorney

DANIEL W. JOHNSON
City Prosecutor

LARRY GARLINGER
Assistant City Prosecutor

120 West Gay Street - #105
Columbus, Ohio 43215
Attorneys for Respondent.